(15)

No. 98-8384

Supreme Court, U.S.
FILED
JUN 28 1999
CLERK

In The

Supreme Court of the United States

TERRY WILLIAMS,

Petitioner,

v.

JOHN TAYLOR, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF VIRGINIA COLLEGE OF CRIMINAL DEFENSE ATTORNEYS AND VIRGINIA TRIAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

GERALD T. ZERKIN #16270
GERALD T. ZERKIN & ASSOCIATES
530 E. Main Street, Suite 800
Richmond, VA 23219
Tel: 804-788-4412

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

30PP

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. POST-CONVICTION RELIEF IS NOT AVAILABLE IN THE COURTS OF VIRGINIA IN DEATH PENALTY CASES, INCLUDING AS TO CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL 4

II. THIS EXTRAORDINARY RECORD OF VIRGINIA'S COURTS IS NOT ATTRIBUTABLE TO ANY SYSTEM THAT ASSURES THE APPOINTMENT OF COMPETENT COUNSEL OR THE PROVISION OF ADEQUATE RESOURCES TO THE DEFENSE 9

III. ENFORCEMENT OF THE SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL CANNOT TOLERATE A HIGHER STANDARD THAN THAT WHICH EXISTED PRIOR TO THE DECISIONS OF THE VIRGINIA SUPREME COURT AND THE FOURTH CIRCUIT IN THIS CASE 15

CONCLUSION 18

APPENDIX 1a

TABLE OF AUTHORITIES

Page

CASES

Atkins v. Commonwealth, 510 S.E.2d 445 (Va. 1999) 11

Blackledge v. Allison, 431 U.S. 63 (1977) 14

Bracy v. Gramley, 520 U.S. 899 (1997) 14

Briley (James) v. Commonwealth, 273 S.E.2d 57 (Va. 1980) 7

Burris v. State, 558 N.E.2d 1067 (Ind. 1990) 8

Cardwell v. Commonwealth, 450 S.E.2d 146 (Va. 1995) 12, 13

Cardwell v. Netherland, 971 F. Supp. 997 (E.D. Va. 1997), *aff'd sub nom, Cardwell v. Greene*, 152 F.3d 331 (4th Cir. 1998), *cert. denied*, 119 S.Ct. 587 (1998) 12, 13

Clark v. Virginia Dep't of Corrections, 318 S.E.2d 399 (Va. 1984) 5

Coleman v. Thompson, 501 U.S. 722 (1991) 6

Coppola v. Warden, 282 S.E.2d 10 (Va. 1981) 5

Correll v. Thompson, 63 F.3d 1279 (4th Cir. 1995), *cert. denied*, 516 U.S. 1035 (1996) 7

Edmonds v. Commonwealth, 329 S.E.2d 807 (Va. 1985) 6

Evans v. Commonwealth, 323 S.E.2d 114 (Va. 1984) 5

Ex Parte Womack, 541 So.2d 47 (Ala. 1988) 8

Graham v. Commonwealth, 459 S.E.2d 97 (Va. 1995), *cert. denied*, 516 U.S. 997 (1995) 7

Harris v. Nelson, 394 U.S. 286 (1969) 14

TABLE OF AUTHORITIES – Continued

Page

Herman v. Claudy, 350 U.S. 116 (1956) 14

In re Neely, 864 P.2d 474 (Cal. 1993) 8

Johnson v. Commonwealth, 255 S.E.2d 525 (Va. 1979) 10

Justus v. Murray, 897 F.2d 709 (4th Cir. 1990) 5

Kimmelman v. Morrison, 477 U.S. 365 (1986) 15

Lilly v. Commonwealth, 499 S.E.2d 522 (Va. 1998), 1999 WL 373136 (U.S. Va. June 10, 1999) 11

Lockhart v. Fretwell, 506 U.S. 364 (1993) ..... *passim*

Mackall v. Angelone, 131 F.3d 442 (4th Cir. 1997) 6

Martin v. Commonwealth, 271 S.E.2d 123 (Va. 1980) 11

Mickens v. Commonwealth, 457 S.E.2d 9 (Va. 1995) 11

Mu'Min v. Thompson, No. 93-6499, 1993 WL 307128 (4th Cir. Aug. 5, 1993) 6

Patterson v. Commonwealth, 283 S.E.2d 212 (Va. 1981) 11

People v. Ruiz, 686 N.E.2d 574 (Ill. 1997) 8

Pope v. Commonwealth, 360 S.E.2d 352 (Va. 1987) 10

Rogers v. Commonwealth, 410 S.E.2d 621 (Va. 1991) 11

Ross v. Kemp, 393 S.E.2d 244 (Ga. 1990) 8

Satcher v. Netherland, 944 F. Supp. 1222 (E.D. Va. 1996), *aff'd in part, rev'd in part*, 126 F.3d 561 (4th Cir. 1997) 6

Saunders v. Commonwealth, 406 S.E.2d 39 (Va. 1991) 6

Spencer v. Commonwealth, 384 S.E.2d 785 (Va. 1989), *cert. denied*, 493 U.S. 1093 (1990) 7

TABLE OF AUTHORITIES – Continued

Page

Spencer v. Commonwealth, 385 S.E.2d 850 (Va. 1989), *cert. denied*, 493 U.S. 1093 (1990) 7

Stamper v. Baskerville, 531 F. Supp. 1122 (E.D. Va. 1982) 5

State v. Brooks, 661 So.2d 1333 (La. 1995) 8

State v. Fisher, 730 P.2d 825 (Ariz. 1986) 8

State v. Tokman, 564 So.2d 1339 (Miss. 1990) 8

State v. Twenter, 818 S.W.2d 628 (Mo. 1991) 8

Stockton v. Commonwealth, 314 S.E.2d 371 (Va. 1984), *cert. denied*, 469 U.S. 873 (1984) 12

Stout v. Thompson, C.A. No. 91-0719-R (W.D. Va. July 31, 1995), *rev'd sub nom, Stout v. Netherland*, Nos. 95-4008, 95-4007, 1996 WL 496601 (4th Cir. Sept. 3, 1996), *cert. denied*, 519 U.S. 1036 (1996) 11

Strickland v. Washington, 466 U.S. 668 (1984) ..... *passim*

Swann v. Commonwealth, 441 S.E.2d 195 (Va. 1994) 6

Titcomb v. Wyant, 333 S.E.2d 82 (Va. 1985) 16

Torres-Arboleda v. Dugger, 636 So.2d 1321 (Fla. 1994) 8

Townes v. Angelone, C.A. No. 2:96CV42, 1996 WL 71809 (E.D. Va. Jan. 17, 1996) 5

United States v. Blue Thunder, 604 F.2d 550 (8th Cir. 1979), *cert. denied*, 444 U.S. 902 (1979) 16

Wainwright v. Sykes, 433 U.S. 72 (1977) 17

Walker v. Commonwealth, No. 990096, 1999 WL 381557 (Va. Jun. 11, 1999) 7

Walton v. Commonwealth, 501 S.E.2d 134 (Va. 1998) 6

TABLE OF AUTHORITIES – Continued

Page

Watkins (Ronald) v. Commonwealth, 385 S.E.2d 50 (Va. 1989) 6

Watkins v. Commonwealth, 331 S.E.2d 422 (Va. 1995) 6

Waye v. Townley, 871 F.2d 18 (4th Cir. 1989) 5

Weeks v. Angelone, 4 F. Supp. 2d 497 (E.D. Va. 1998), *aff'd*, No. 98-21, 1999 WL 288504 (4th Cir. May 10, 1999) 6

Williams v. Pruett, C.A. No. 97-1627-A (E.D. Va. April 7, 1998), *Slip op.* at 18-19, *rev'd sub nom, Williams v. Taylor*, 163 F.3d 860 (1998), *cert. granted*, 119 S.Ct. 1355 (1999) 10, 16

Williams v. Warden, 487 S.E.2d 194 (Va. 1997) 15, 16, 17

Wilson v. State, 787 P.2d 401 (Nev. 1988)..... 8

Wise v. Williams, 982 F.2d 142 (4th Cir. 1992) 6

Yeatts v. Murray, 455 S.E.2d 18 (Va. 1995) 14

CONSTITUTIONAL PROVISIONS

Sixth Amendment to the United States Constitution ..... *passim*

STATUTES

Va. Code Ann. § 8.01-654 (Michie 1992)..... 6, 7, 15

Va. Code Ann. § 19.2-163.7 (Michie 1995) 9

Va. Code Ann. § 19.2-163.8 (Michie 1995) 9, 10

Va. Code Ann. § 19.2-264.5 (Michie 1995) 12

TABLE OF AUTHORITIES – Continued

Page

OTHER

Government Information Sharing Project, General Profile for Richmond City, Virginia (visited Jun. 23, 1999) <http://govinfo.library.orst.edu/cgi-bin/state2?va>.....7, 8

Government Information Sharing Project, General Profile for Danville City, Virginia (visited Jun. 23, 1999) <http://govinfo.library.orst.edu/cgi-bin/state2?va>..... 8

INTEREST OF *AMICI CURIAE*

The Virginia College of Criminal Defense Attorneys (VCCDA), and the Virginia Trial Lawyers Association (VTLA) file this joint brief in support of the Petitioner. *See*, Rule 37.3(a). Counsel for Petitioner and Respondent have consented to the filing of this Brief.[1]

VCCDA is recognized by the National Association of Criminal Defense Lawyers as its Virginia state affiliate. VCCDA is a statewide, non-profit organization of approximately 470 criminal defense practitioners. Its purpose is to enhance the quality of criminal justice in the Commonwealth of Virginia and to defend individual liberties guaranteed by the Bill of Rights. It has a keen interest in ensuring that criminal and post-conviction proceedings in the Commonwealth are handled in a proper and fair manner. To that end, it conducts continuing legal education seminars for criminal defense practitioners to improve the quality of their representation. In addition, it provides direct services to its members when they face important issues implicating the fundamental fairness of the criminal justice system, including litigation advice and support, research and the filing of amicus briefs.

VTLA is a non-profit professional organization of approximately 2,800 trial lawyers throughout the Commonwealth of Virginia. Founded in 1960, VTLA works to

---

[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity other than VCCDA or VTLA and their members, made any monetary contributions to its preparation or submission. *See* Rule 37.6.

enhance the professionalism and skills of trial lawyers and to promote the fair and effective administration of justice. VTLA includes among its interest sections a Criminal Law Section. Its members regularly participate in trials in state and federal courts. As an association of trial lawyers dedicated to preserving the rights of individual litigants in civil and criminal trials, VTLA believes it is well situated to recognize issues of importance to trial lawyers and their clients and to assist the Court.

Members of VCCDA and VTLA are regularly retained and appointed by the courts of the Commonwealth and the United States to represent capital and other defendants, and to represent inmates in habeas corpus proceedings.

The decisions of the Virginia Supreme Court and the Fourth Circuit, reversing, respectively, the decisions of the state circuit court and the United States District Court as to the standards applicable to ineffective assistance of counsel claims eviscerate the Sixth Amendment right to counsel in the Commonwealth. Being committed to the constitutional rights of all criminal defendants and to the need for defendants to be able to vindicate those rights in both the courts of the Commonwealth and the United States, *Amici* believe that the decision in this case must be overturned.

The brief of *Amici* attempts to demonstrate four points as to the enforcement of the constitutional guarantee of the effective assistance of counsel in Virginia: (1) relief is not available through post-conviction proceedings in capital cases; (2) relief based upon claims of

ineffective assistance of counsel specifically is not available in capital cases; (3) these circumstances are not the result of a system that assures quality representation in capital cases; and (4) no instances of egregiously deficient representation will be remedied if the standard of *Lockhart v. Fretwell*, 506 U.S. 364 (1993) is grafted onto that of *Strickland v. Washington*, 466 U.S. 668 (1984).

SUMMARY OF ARGUMENT

There is no meaningful opportunity for post-conviction relief in Virginia, at least in capital cases. With the single exception of one case in which the Commonwealth conceded prosecutorial misconduct, relief has been denied in every capital habeas corpus case. Both times a trial judge has granted post-conviction relief, the Virginia Supreme Court has reversed that decision. Since it has obtained sole, original jurisdiction over such cases, the Court has not even granted an evidentiary hearing, much less relief.

The fact that relief was recommended in the instant case is particularly significant given the record of the presiding judge. However calculated, that judge has sentenced more defendants to death than any other Virginia judge. He has also denied relief in each of the other capital post-conviction cases over which he has presided.

Nothing in the Virginia system accounts for the conspicuously unique record of the Virginia judiciary in general, and the Virginia Supreme Court in particular, in rejecting all claims for post-conviction relief, other than an apparent commitment to reject any attempt to upset a

death sentence. Only voluntary standards for capital counsel exist and those establish only weak qualifications. Moreover, counsel are not provided the resources necessary to adequately defend capital cases. Finally, the absence of post-conviction relief cannot be explained by the Court's commitment to correcting errors on direct appeal; the Court's rate of granting relief there is nearly as low as it is in post-conviction.

The last thing the Sixth Amendment needs in Virginia is the creation of an even higher standard than that which was established in *Strickland v. Washington*, 466 U.S. 668 (1984). Yet that is what the Virginia Supreme Court and the Fourth Circuit have done in this case. The additional hurdle found by those Courts in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), and invoked to thwart the judgment of the trial judge in the Petitioner's case, will truly be the death knell for ineffective assistance of counsel claims in the Commonwealth, assuming the Sixth Amendment is not already beyond resuscitation.

ARGUMENT

I. POST-CONVICTION RELIEF IS NOT AVAILABLE IN THE COURTS OF VIRGINIA IN DEATH PENALTY CASES, INCLUDING AS TO CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The recommendation of the circuit court judge in this case to grant the Petitioner relief as to his death sentence is virtually unique in modern Virginia capital punishment jurisprudence. With but one exception, not since 1983 had

a Virginia circuit court judge, or the justices of the Virginia Supreme Court, granted post-conviction relief in a capital case.[2]

See, Clark v. Virginia Dep't of Corrections, 318 S.E.2d 399 (Va. 1984). Moreover, no Virginia court has granted such relief since the decision in Petitioner's case, nor had any done so in the capital habeas cases which preceded the Supreme Court's decision in *Clark*. Relief has thus been denied in all 100 Virginia death penalty habeas corpus cases under the modern statute where the Commonwealth has not confessed error, including the two cases in which relief was granted by the trial judge, those of Clark and Williams.[3]

The vast majority of these petitions contained Sixth Amendment claims of ineffective assistance of counsel. Indeed, only nine of those 100 petitions did not, or were filed untimely and, therefore, not addressed on the merits.[4] Thus, relief on ineffective assistance of counsel

---

[2] That exception was the case of Wilbert Evans, in which the Commonwealth confessed error. The prosecutor had used criminal convictions against Evans which actually did not exist. The case involved a claim of prosecutorial misconduct, not ineffective assistance of counsel. *See, Evans v. Commonwealth*, 323 S.E.2d 114 (Va. 1984).

[3] *Amici* do not include here any successor petitions. Every such petition has been denied.

[4] Those capital cases in which the petitioners did not raise ineffective assistance claims in their initial state petitions are *Coppola v. Warden*, 282 S.E.2d 10 (Va. 1981); *Waye v. Townley*, 871 F.2d 18 (4th Cir. 1989); *Justus v. Murray*, 897 F.2d 709 (4th Cir. 1990); *Stamper v. Baskerville*, 531 F. Supp. 1122 (E.D. Va. 1982); *Townes v. Angelone*, C.A. No. 2:96CV42, 1996 WL 71809 (E.D. Va.

grounds has ultimately been denied by the Virginia courts in each of the ninety-one capital cases in which it has been timely raised.[5]

The significance of the circuit court's decision in Petitioner's case is all the more dramatic given the record of that particular court – and the presiding judge – in death penalty cases. More defendants have been sentenced to death in the Circuit Court of the City of Danville than in any other jurisdiction in Virginia.[6] Judge Ingram, who granted Petitioner relief in his post-conviction case, presided over each of those cases, five times

---

Jan. 17, 1996); *Mu'Min v. Thompson*, No. 93-6499, 1993 WL 307128 (4th Cir. Aug. 5, 1993); *Satcher v. Netherland*, 944 F. Supp. 1222 (E.D. Va. 1996); and *Mackall v. Angelone*, 131 F.3d 442 (4th Cir. 1997).

In *Weeks v. Angelone*, 4 F. Supp. 2d 497 (E.D. Va. 1998), *aff'd*, No. 98-21, 1999 WL 288504 (4th Cir. May 10, 1999), Petitioner's counsel filed the petition in the circuit court, instead of in the Virginia Supreme Court. *See*, Va. Code Ann. § 8.01-654 (Michie 1992). As a result, his Sixth Amendment claims were held to be defaulted. *See, Weeks*, 4 F. Supp. 2d at 511.

[5] In two cases, the petition filed in the circuit court raised such a claim and relief was denied, but the appeal to the Virginia Supreme Court was untimely. *See, Coleman v. Thompson*, 501 U.S. 722 (1991); *Wise v. Williams*, 982 F.2d 142 (4th Cir. 1992).

[6] The defendants sentenced to death in Danville are Johnny Watkins, who was sentenced to death in two separate trials, *see, Watkins v. Commonwealth*, 331 S.E.2d 422 (Va. 1995); Dana Ray Edmonds, *see, Edmonds v. Commonwealth*, 329 S.E.2d 807 (Va. 1985); Ronald Watkins, *see, Watkins (Ronald) v. Commonwealth*, 385 S.E.2d 50 (Va. 1989); Calvin Swann, *see, Swann v. Commonwealth*, 441 S.E.2d 195 (Va. 1994); *see*, William Saunders, *Saunders v. Commonwealth*, 406 S.E.2d 39 (Va. 1991); and Percy Walton, *see, Walton v. Commonwealth*, 501 S.E.2d 134 (Va. 1998).

imposing the jury's recommended sentence of death and concluding that death was the appropriate punishment himself in the three cases tried without a jury. Moreover, Judge Ingram dismissed each of the other six capital habeas corpus petitions that were filed for the capital defendants he had sentenced to death,[7] as well as one petition filed by a capital defendant in a neighboring jurisdiction.[8]

The record of Judge Ingram and the Danville Circuit Court is all the more impressive when it is compared to the rest of the Commonwealth. While Judge Ingram has imposed death sentences in eight different cases, the remainder of the Virginia judiciary has imposed death sentences in only 123 cases.[9] Thus, Judge Ingram is

---

[7] Judge Ingram did not consider the petition of Percy Walton, whose habeas corpus petition was filed directly in the Virginia Supreme Court, pursuant to the 1995 amendments to § 8.01-654 of the Virginia Code.

[8] That petitioner was Walter Correll, who was sentenced to death in Franklin County. *See, Correll v. Thompson*, 63 F.3d 1279 (4th Cir. 1995).

[9] Judge Wilkinson of the Circuit Court of the City of Richmond is the only other judge in the Commonwealth to have imposed death sentences in as many as five cases. *See, Walker v. Commonwealth*, No. 990096, 1999 WL 381557 (Va. Jun. 11, 1999); *Graham v. Commonwealth*, 459 S.E.2d 97 (Va. 1995); *Spencer v. Commonwealth*, 384 S.E.2d 785 (Va. 1989); *Spencer v. Commonwealth*, 385 S.E.2d 850 (Va. 1989); *Briley (James) v. Commonwealth*, 273 S.E.2d 57 (Va. 1980). In fact, only eleven death sentences have been handed down in the City of Richmond, even though Richmond has almost *four times* the population of Danville and more murders in one year than Danville has had since 1970. *See,* Government Information Sharing Project, *General Profile for Richmond City, Virginia*

responsible for imposing death sentences in 6.5% of the Virginia cases resulting in a capital sentence, even though his jurisdiction accounts for only 0.8% of the population of Virginia.[10] In other words, Virginians are *eight times* more likely to be sentenced to death in Danville – and by Judge Ingram – than in the rest of the Commonwealth.

When all is said and done, Judge Ingram has sentenced to death more defendants than any other judge in the state which has executed more defendants than any other state but one, and which has granted less capital post-conviction relief – i.e., none – than any other state in the country with a significant death row population.[11]

(visited Jun. 23, 1999) <http://govinfo.library.orst.edu/cgi-bin/state2?va> (reporting the population of Richmond to be 203,506 according to the 1990 census); *General Profile for Danville City, Virginia, id.* (reporting the population of Danville to be 53,056 according to the 1990 census).

[10] The population of the Commonwealth is 6,187,358 and of the City of Danville is 53,056, according to the 1990 census. *See, General Profile for Virginia* and *General Profile for Danville City, Virginia, supra* note 9.

[11] Notably, other states, including some which have not been shy about executions, have found cases worthy of relief on ineffective assistance of counsel grounds, even in relation to the investigation and presentation of mitigation, as in the Petitioner's case. *See, e.g., State v. Brooks*, 661 So.2d 1333 (La. 1995); *Torres-Arboleda v. Dugger*, 636 So.2d 1321 (Fla. 1994); *State v. Tokman*, 564 So.2d 1339 (Miss. 1990); *Wilson v. State*, 787 P.2d 401 (Nev. 1988); *State v. Twenter*, 818 S.W.2d 628 (Mo. 1991); *People v. Ruiz*, 686 N.E.2d 574 (Ill. 1997); *Burris v. State*, 558 N.E.2d 1067 (Ind. 1990); *Ross v. Kemp*, 393 S.E.2d 244 (Ga. 1990); *Ex Parte Womack*, 541 So.2d 47 (Ala. 1988); *In re Neely*, 864 P.2d 474 (Cal. 1993); *State v. Fisher*, 730 P.2d 825 (Ariz. 1986).

II. THIS EXTRAORDINARY RECORD OF VIRGINIA'S COURTS IS NOT ATTRIBUTABLE TO ANY SYSTEM THAT ASSURES THE APPOINTMENT OF COMPETENT COUNSEL OR THE PROVISION OF ADEQUATE RESOURCES TO THE DEFENSE.

The complete absence of findings of Sixth Amendment violations by Virginia's courts is surely not attributable to some uniform excellence in capital representation in Virginia. Until 1992, Virginia had no qualification standards for counsel appointed to represent capital defendants. *See*, Va. Code Ann. §§ 19.2-163.7, 19.2-163.8 (Michie 1995). Virginia then committed to the State Bar and Public Defender Commission the responsibility to adopt standards for the appointment of counsel in such cases and to maintain lists of attorneys qualified under those standards.[12] *See*, § 19.2-163.8.

The *de minimus* standards established pursuant to this section, however, are plainly inadequate to assure that only counsel capable of providing quality representation to capital defendants are appointed. They require only experience as lead counsel in five felony trials involving crimes of violence punishable by at least *five years* imprisonment. Perhaps most significantly, the Public Defender Commission has never established any mechanism for evaluating or enforcing the statutory

---

[12] While § 19.2-163.7 appears to require the appointment of counsel from the lists maintained by the Public Defender Commission, § 19.2-163.8C specifically states that, notwithstanding that section, the court may appoint counsel who is not on the lists.

requirement that counsel exhibit a "demonstrated proficiency and commitment to quality representation." *See*, § 19.2-163.8. Finally, noncompliance with the provisions of these sections is explicitly eliminated as "a basis for a claim of error at trial. . . . " § 19.2-163.8D. Thus, use of the standards, as inadequate as they are, and the lists of "qualified" attorneys, is ultimately voluntary.

Not only do these minimum, non-mandatory qualifications for capital trial counsel do little to assure the appointment of competent counsel, Virginia law does nothing to provide counsel with the resources necessary to provide adequate representation. Virginia law does not require the provision of – and trial courts rarely do provide – investigative sources. *See, e.g., Pope v. Commonwealth*, 360 S.E.2d 352, 356 (Va. 1987) (and cases cited therein). Thus, in Petitioner's own case, the request for an investigator was denied.[13]

Whether or not for these reasons, the record of capital cases demonstrates that the failure of the Virginia courts to grant relief on Sixth Amendment claims cannot be attributed to the quality of representation.[14] Indeed,

---

[13] The problem with obtaining resources is so acute in Virginia that, despite the obvious need for it in this case, counsel did not even realize that a pathologist could be appointed. *Williams v. Pruett*, C.A. No.97-1627-A (E.D. Va. April 7, 1998), *Slip op.* at 18-19, *rev'd, sub nom, Williams v. Taylor*, 163 F.3d 860 (1998), *cert. granted*, 119 S.Ct. 1355 (1999).

[14] Likewise, it cannot be attributed to the generosity of the Virginia Supreme Court on direct appeal. The Court has reversed only eight of 121 capital trials, as to either guilt or punishment. Three of those cases were among the first ten reviewed under the modern statute. *See, Johnson v.*

Virginia death cases are replete with appalling omissions by counsel. Larry Stout's counsel, for example, performed only a "minimal" investigation and presentation of mitigating evidence. *Stout v. Thompson*, C.A. No. 91-0719-R, *Slip op.* at 17 (W.D. Va. July 31, 1995), *rev'd sub nom, Stout v. Netherland*, Nos. 95-4008, 95-4007, 1996 WL 496601 (4th Cir. Sept. 3, 1996), *cert. denied*, 519 U.S. 1036 (1996). Stout's background included "[m]ost forms of abuse that can possibly be perpetrated on a single human being:" stigmatization, even within his own family, due to his mixed race parentage, extreme parental alcoholism, a father who forced him to work in migrant labor camps, horrifying physical and sexual abuse by his father, drug problems, a family lifestyle which precluded his receiving an education and mental deficiencies. It was described by two mental health experts as "one of the worst [personal histories] they had seen." *Slip op.* at 15-16. According to the District Court in Stout's case, this information was readily available to trial counsel. *Id.* at 15. Nevertheless, the Virginia circuit court and Supreme Court rejected

---

Commonwealth, 255 S.E.2d 525 (Va. 1979); *Martin v. Commonwealth*, 271 S.E.2d 123 (Va. 1980); *Patterson v. Commonwealth*, 283 S.E.2d 212 (Va. 1981). Until the recent reversal of a death sentence in *Atkins v. Commonwealth*, 510 S.E.2d 445 (Va. 1999), the Court had affirmed every capital case during the previous eight years, *see, Rogers v. Commonwealth*, 410 S.E.2d 621 (Va.1991), although it did remand one case for resentencing after this Court's vacation of its judgment. *See, Mickens v. Commonwealth*, 457 S.E.2d 9 (Va. 1995). Of course, among the Court's most recent affirmances in a capital case was its unanimous decision in *Lilly v. Commonwealth*, 499 S.E.2d 522 (Va. 1998), which this Court reversed, also unanimously. 1999 WL 373136 (U.S. Va. June 10, 1999).

Stout's Sixth Amendment claim for no stated reasons, without even the benefit of an evidentiary hearing.

One of the most remarkable examples of the Virginia Supreme Court's disdain for claims of ineffective assistance of counsel is to be found in the case of Kevin Cardwell. Following the appointment of a mental health expert to assist the defense, counsel failed to arrange for a timely evaluation. After the jury fixed their client's sentence at death, counsel still failed to have the evaluation completed prior to his actual sentencing, either for presentation to the judge in connection with the actual sentencing,[15] or for a proffer to demonstrate the prejudice flowing from the court's denial of their earlier motion for a continuance. *See, Cardwell v. Netherland*, 971 F. Supp. 997, 1005 (E.D. Va. 1997), *aff'd sub nom, Cardwell v. Greene*, 152 F.3d 331 (4th Cir. 1998), *cert. denied*, 119 S.Ct. 587 (1998).

On appeal, the Virginia Supreme Court, in rejecting Cardwell's challenge to the trial court's denial of a continuance, noted that, while one prior continuance had been granted, and the trial court had promptly appointed the defense expert, counsel had failed to determine if the expert was available until after that appointment was made. *Cardwell v. Commonwealth*, 450 S.E.2d 146, 150-52 (Va. 1995), *cert. denied*, 115 S.Ct. 1826 (1995). Even then, counsel waited three weeks, until the commencement of

---

[15] Although the jury "fixes" the sentence, the judge may decline to impose the death penalty for good cause shown. Va. Code § 19.2-264.5; *Stockton v. Commonwealth*, 314 S.E.2d 371, 386 (Va. 1984), *cert. denied*, 469 U.S. 873 (1984).

the penalty phase of the trial, before seeking another continuance. *Id.* at 151-52. Moreover,

> counsel never followed through regarding Cardwell's examination by Dr. Thomas, although the trial court did not sentence Cardwell [for two months]. *Had the examination been performed, we might be in a position to say whether Cardwell's rights were prejudiced.* As the record stands, however, we are left to mere speculation. Under the circumstances, therefore, we cannot say that the trial court abused its discretion in denying the second continuance.

Id. at 152 (emphasis added).

Despite this recognition of counsel's negligence in regard to obtaining a mental health evaluation, seeking a continuance, and making the requisite proffer for appeal, the Virginia Supreme Court denied Cardwell's motion for the appointment of a mental health expert, during his habeas corpus proceeding. *See, Cardwell v. Netherland*, 971 F. Supp. at 1006-7. Consequently, Cardwell was left without the tools necessary to prove, during his state habeas corpus proceeding, the prejudice flowing from the deficient performance which the Virginia Supreme Court itself had recognized on direct appeal.[16]

The failure of the Virginia courts to grant post-conviction relief is plainly not attributable to procedural

---

[16] Ultimately, the District Court, after authorizing the services of a mental health expert, determined that Cardwell did not suffer prejudice at his trial. *Cardwell v. Netherland*, 971 F. Supp. at 1017-19. Of course, the Virginia Supreme Court did not know that when it threw up its roadblock to Cardwell proving his Sixth Amendment claim.

safeguards adopted for habeas corpus cases, any more than it is attributable to the existence of safeguards at trial. There is no entitlement to an evidentiary hearing or discovery in Virginia, regardless of the allegations in the petition. Unlike in federal court, the availability of such hearings is simply committed to the discretion of the presiding judge. *Compare, Yeatts v. Murray*, 455 S.E.2d 18, 21 (Va. 1995) *with Blackledge v. Allison*, 431 U.S. 63, 80-83 (1977) (petitioner is entitled to evidentiary hearing if he alleges facts which, if proven, would be sufficient to demonstrate entitlement to relief and which, "when viewed against the [state court] record," are not "so 'patently false or frivolous' as to warrant summary dismissal") (*quoting Herman v. Claudy*, 350 U.S. 116, 119 (1956)). Moreover, discovery is even more rare than evidentiary hearings.[17]

---

[17] For example, the Virginia Supreme Court has not granted a discovery motion in a single capital post-conviction case since it assumed jurisdiction. Contrary to the federal rule, discovery is left to the discretion of the presiding judge or justices and, as with evidentiary hearings, no standards for the exercise of that discretion are established. *Compare Yeatts*, 455 S.E.2d at 21 *with Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997) (discretion is abused if discovery is denied where "specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief. . . . " (*quoting Harris v. Nelson*, 394 U.S. 286, 299 (1969)).

III. ENFORCEMENT OF THE SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL CANNOT TOLERATE A HIGHER STANDARD THAN THAT WHICH EXISTED PRIOR TO THE DECISIONS OF THE VIRGINIA SUPREME COURT AND THE FOURTH CIRCUIT IN THIS CASE.

It is against this backdrop that the history of Petitioner's own case must be assessed. But for the trial judges in the cases of Clark and Petitioner, no Virginia court has found a single attorney in a capital case to have been constitutionally ineffective, or, if ineffective, to have prejudiced his client by his deficient performance. Not only has the Virginia Supreme Court reversed both grants of relief in capital habeas cases, and affirmed every denial of relief by a circuit court judge, it has, since it assumed sole original jurisdiction in such cases in 1995,[18] rejected all fifteen capital habeas petitions filed with it *without granting a single evidentiary hearing*. Thus, in Virginia, after fifteen years of litigation under the formula of *Strickland v. Washington*, 466 U.S. 668 (1984), it *cannot* fairly be said, in capital cases, at least, that *Strickland*'s standard, although "highly demanding," is "by no means insurmountable." *See, Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986); *Williams v. Warden*, 487 S.E.2d 194, 198 (Va. 1997) (*citing, Kimmelman*, 477 U.S. at 382).

Moreover, the determination that was rejected by the Supreme Court in this case was made by the very judge whom Virginia law recognizes as the best situated to assess the merits of a habeas corpus petition – the trial

---

[18] *See*, Va. Code Ann. § 8.01-654 (Michie 1992).

judge. As the Virginia Supreme Court stated in *Titcomb v. Wyant*:

> We believe that in most cases where the petitioner raises a claim of ineffective counsel it is logical and appropriate for the trial judge to hear the petition for the writ. The trial judge will have the advantage of having seen trial counsel's performance, which may be skillful or deficient, in the context of an adversary proceeding. *See, United States v. Blue Thunder*, 604 F.2d 550 (8th Cir. 1979), *cert. denied*, 444 U.S. 902 (1979). The trial judge also will have heard the evidence and gauged the credibility of witnesses. . . .

333 S.E.2d 82, 87 (Va. 1985). That, of course, is no less true in relation to the assessment of the prejudice flowing from counsel's deficient performance, just as, in the view of the District Court, it was true as to the trial judge's "unique position of being able to judge [defense counsel's] performance during trial." *Williams v. Pruett, Slip. op.* at 18. Nevertheless, just as it did in the case of James T. Clark, Jr., the Virginia Supreme Court rejected the conclusions of the trial judge – a judge with no reluctance to impose capital punishment or to protect such sentences once he imposes them – to maintain its perfect record of rejecting such claims and, indeed, post-conviction relief of any kind in capital cases.

Implicit in the Virginia Supreme Court's conclusion that Petitioner had not met the standard set forth in *Lockhart v. Fretwell*, 506 U.S. 364 (1993) is that the judgment in his favor constituted a "windfall." *See, id.* at 369-70. Indeed, the Court quoted the "windfall" language from *Fretwell*. *See, Williams v. Warden*, 487 S.E.2d at 198.

The notion, however, that the trial/habeas judge in this case would have bestowed a "windfall" on a capital petitioner, such as Williams, is beyond serious consideration.

It simply cannot be the case that the law actually demands a standard more onerous than that which has enabled the Virginia judiciary to ultimately reject every claim of ineffective assistance of counsel in a capital case, including the Virginia Supreme Court's dismissal, without even the benefit of an evidentiary hearing, all twenty-five capital habeas cases which have been filed with it since it assumed original jurisdiction over such cases.[19] A showing of a "reasonable probability" – i.e., a "probability sufficient to undermine confidence in the result" – that a capital defendant would not have been sentenced to death, as is required under *Strickland*, 466 U.S. at 694, surely satisfies the state's concern for making the trial "the main event," *see, e.g., Wainwright v. Sykes*, 433 U.S. 72, 90 (1977), without adding a new requirement that the petitioner demonstrate that his trial was "fundamentally unfair[ ]," *see, Williams v. Warden*, 487 S.E.2d at 198 (*quoting, Fretwell*, 506 U.S. at 369). It is unfair enough that the defendant was sentenced to death due to his lawyer's deficient performance in a proceeding sufficiently unreliable that the court lacks confidence in the outcome. The addition of this further burden will surely prove fatal to

---

[19] Although the Supreme Court exercised its original jurisdiction over Petitioner's case once the new statute was passed, an evidentiary hearing had already been ordered by the circuit court.

the already terribly wounded Sixth Amendment right to the *effective* assistance of counsel.

CONCLUSION

The judgment of the Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

GERALD T. ZERKIN
Counsel of Record
530 E. Main Street, Suite 800
Richmond, VA 23219
(804) 788-4412

Attorney for Amici Curiae

Virginia College of Criminal Defense Attorneys

Virginia Trial Lawyers Association

APPENDIX

CODE OF VIRGINIA ANNOTATED

§ 8.01-654. When and by whom writ granted; what petition to contain. – A. 1. The writ of habeas corpus ad subjiciendum shall be granted forthwith by the Supreme Court or any circuit court, to any person who shall cause to believe that he is detained without lawful authority.

* * *

C. 1. With respect to any such petition filed by a petitioner held under the sentence of death, and subject to the provisions of this subsection, the Supreme Court shall have exclusive jurisdiction to consider and award writs of habeas corpus. The circuit court which entered the judgment order setting the sentence of death shall have authority to conduct an evidentiary hearing on such a petition only if directed to do so by order of the Supreme Court.

* * *

---

§ 19.2-163.7. Counsel in capital cases. – In any case in which an indigent defendant is charged with a capital offense, the judge of the circuit court, upon request for the appointment of counsel, shall appoint one or more attorneys from the list or lists established by the Public Defender Commission pursuant to § 19.2-163.8 to represent the defendant at trial and, if the defendant is sentenced to death, on appeal. If the sentence of death is affirmed on appeal, the court shall, within thirty days after the decision of the Supreme Court of Virginia,

appoint counsel from the same list, or such other list as the Commission may establish, to represent an indigent prisoner under sentence of death in a state habeas corpus proceeding. The Attorney General shall have no standing to object to the appointment of counsel for the petitioner.

---

§ 19.2-163.8. List of qualified attorneys. – A. The Public Defender Commission, in conjunction with the Virginia State Bar, shall adopt standards for the appointment of counsel in capital cases, which take into consideration, to the extent practicable, the following criteria: (i) license or permission to practice law in Virginia; (ii) general background in criminal litigation; (iii) demonstrated experience in felony practice at trial and appeal; (iv) experience in death penalty litigation; (v) familiarity with the requisite court system; (vi) current training in death penalty litigation; and (vii) demonstrated proficiency and commitment to quality representation.

B. The Public Defender Commission shall maintain a list or lists of attorneys admitted to practice law in Virginia who are qualified to represent indigent defendants charged with capital murder or sentenced to death. In establishing such a list or lists, the Commission shall consider all relevant factors, including but not limited to, the attorney's background, experience, and training and the Commission's assessment of whether the attorney is competent to provide quality legal representation.

C. Notwithstanding the requirements of § 19.2-163.7, the judge of the circuit court may appoint counsel who is not included on the lists (sic) or lists, but who otherwise qualifies under the standards established and maintained by the Commission.

D. Noncompliance with the requirements of this article shall not form the basis for a claim or error at trial, on appeal, or in any habeas corpus proceeding. The performance of habeas corpus counsel appointed pursuant to this article shall not form a basis for relief in any subsequent habeas corpus proceeding.

E. By July 1, 1992, the Public Defender Commission shall, in conjunction with the Virginia State Bar, promulgate and thereafter maintain standards for the qualifications of counsel who shall be considered eligible to be placed on a list for appointment.

F. The provisions of this article, with the exception of subsection E, shall not become effective until July 1, 1992.

---

§ 19.2-264.5. Post-sentence reports. – When the punishment of any person has been fixed at death, the court shall, before imposing sentence, direct a probation officer of the court to thoroughly investigate the history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just.

FEBRUARY 22, 1992

STANDARDS FOR THE QUALIFICATION OF APPOINTED COUNSEL IN CAPITAL CASES

Pursuant to Section 19.2-163.8(E) of the **Code of Virginia** of 1950, as amended, the Public Defender Commission, in conjunction with the Virginia State Bar, hereby sets forth the following standards for appointed counsel determined to be qualified and possessing proficiency and commitment to quality representation in capital cases.

* * *

A. TRIAL COUNSEL:

1. Court-appointed "lead counsel" must:

   a. Be an active member in good standing of the Virginia State Bar or admitted to practice *pro hac vice*.

   b. Have at least five years of criminal litigation practice with demonstrated competence.

   c. Have had, within the past two years, some specialized training in capital litigation.

   d. Have at least *one* of the following qualifications:

      i. Experience as "lead counsel" in the defense of at least one capital case;

      ii. Experience as "co-counsel" in the defense of at least two capital cases;

iii. Experience as "lead counsel" (or as lead prosecutor) in at least five felony jury trials in Virginia courts involving crimes of violence which carry, upon conviction, a minimum sentence of at least five years imprisonment.

e. Be familiar with the requisite court system, including specifically the procedural rules regarding timeliness of filings and procedural default.

f. Have demonstrated proficiency and commitment to quality representation.